

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35198

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 395
	)	
Plaintiff-Respondent,	)	Filed: March 24, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
TWO JINN INC., dba ALADDIN BAIL	)	THIS IS AN UNPUBLISHED
BONDS/ANYTIME BAIL BONDS	)	OPINION AND SHALL NOT
	)	BE CITED AS AUTHORITY
Real Party in Interest-Appellant,	)	
	)	
and	)	
	)	
MARTIN CASTILLO LOPEZ, JR.,	)	
	)	
Defendant.	)	
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

Order denying motion to set aside forfeiture and exoneration of bond, affirmed.

Susan M. Campbell, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent. Jennifer E. Birken argued.

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PERRY, Judge

Two Jinn, Inc., d/b/a Aladdin Bail Bonds/Anytime Bail Bonds, as the real party in interest, appeals from the district court's order denying Two Jinn's motion to set aside forfeiture and exonerate bond. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Martin Castillo Lopez, Jr. was charged with lewd conduct with a minor child under sixteen. I.C. § 18-1508. Prior to Lopez's arraignment, Two Jinn posted bond in the amount of \$50,000. Lopez appeared at his arraignment and was released on bond. Thereafter, Lopez failed

to appear at a pre-trial conference, whereupon defense counsel informed the district court that counsel was unsure as to the reason for his absence. At the rescheduled date for the pre-trial conference, Lopez again failed to appear. Defense counsel notified the district court that Lopez had not been to work in ten days and his father had indicated that Lopez had moved. The state informed the district court that Lopez had fled to Mexico.

The district court gave a notice of bond forfeiture to Two Jinn on April 13, 2007. Two Jinn and the state later stipulated to extend the length of time for Two Jinn to surrender Lopez to the district court from 90 to 180 days. This provided Two Jinn until October 10, 2007, to surrender Lopez to the district court. Two Jinn investigators located Lopez in Mexico but were unsuccessful in convincing him to return to the United States. Because Two Jinn did not have the authority to return Lopez to the United States from Mexico against his will, Two Jinn requested that the state extradite him pursuant to the United States-Mexico extradition treaty, 31 U.S.T. 5061, and indicated that it would pay extradition costs up to \$50,000. Two Jinn filed a motion to set aside the forfeiture on October 5. On October 11, Two Jinn and the state then stipulated to set aside the notice of forfeiture for sixty days, thus providing Two Jinn until December 9 to surrender Lopez to the district court. The district court entered an order to that effect on October 26.

The state later refused to pursue Lopez's extradition from Mexico because, the state asserted, under terms of the extradition treaty Mexico could either deny the request or prosecute Lopez in Mexico, which would bar further prosecution in the Idaho. Two Jinn then filed a motion to set aside the forfeiture and exonerate the bond, arguing that justice so required because Two Jinn had pursued all lawful channels to return Lopez to the state at its own expense and the state now refused to extradite. The district court denied Two Jinn's motion because it could find no grounds on which justice did not require the enforcement of the forfeiture. Two Jinn appeals.

## **II.**

### **ANALYSIS**

Two Jinn argues that the district court abused its discretion by denying its motion to set aside the forfeiture and exonerate the bond. Specifically, Two Jinn contends that the district court's decision was not based on an exercise of reason because it was under the false assumption that Two Jinn was free to charge any bond premium it chose based on Lopez's flight risk. Additionally, Two Jinn argues that it complied with all of its obligations as surety because

it did everything it could legally do to bring Lopez back and then the state refused to extradite. Thus, Two Jinn claims this results in a windfall for the state since the amount of bail and the cost of Two Jinn's investigation far exceeded the state's costs. Furthermore, Two Jinn contends that the district court did not give proper weight and consideration to the relevant factors in determining whether to exonerate the bond.

Whenever a defendant fails to appear in court when required to do so by his or her bail conditions, the court must forfeit the bail if there is no sufficient excuse for the failure to appear. I.C.R. 46(e)(1);<sup>1</sup> I.C. § 19-2927.<sup>2</sup> Defendants, or their surety, may file a motion to exonerate a bond, which, if granted, would release the defendants or surety from liability. I.C.R. 46(g); I.C. § 19-2927.

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<sup>1</sup> Idaho Criminal Rule 46(e)(1) provides:

In the event the defendant fails to appear before the court at the time required as a condition of bail, and the court finds that such failure is without sufficient cause, or where no evidence is presented which would provide sufficient cause, the court shall immediately ex parte forfeit the bail and issue a bench warrant for the defendant.

<sup>2</sup> Idaho Code Section 19-2927, forfeiture of bail, provides:

If, without sufficient excuse, the defendant fails to appear before the court upon any occasion when his presence has been ordered the court must immediately direct the fact to be entered upon its minutes, order the forfeiture of the undertaking of bail, or the money deposited instead of bail, as the case may be, and order the issuance of a bench warrant for the arrest of the defendant. The clerk shall mail written notice within five (5) days of the forfeiture for failure to appear to the last known address of the person posting the undertaking of bail or, if the bail consists of a surety bond, to the surety or its designated agent. A failure to give timely notice shall exonerate the bail or undertaking. If at any time within one hundred eighty (180) days after such entry in the minutes, the defendant appears and satisfactorily excuses his neglect, the court shall direct the forfeiture of the undertaking or the deposit to be exonerated.

If within one hundred eighty (180) days of the date of forfeiture, a person, other than the defendant, who has provided bail for the defendant, surrenders the defendant to the jail facility of the county which issued the warrant, the undertaking of bail or deposits are thereby exonerated.

The court which has forfeited the undertaking of bail, or the money deposited instead of bail, may, before remittance of the forfeiture, and with the written consent of the person posting the same, set aside the forfeiture and reinstate the undertaking of bail or money deposited instead of bail.

Idaho Criminal Rule 46(g) provides:

When the conditions of bail have been satisfied, or if the clerk fails to mail a written notice to the person posting the undertaking of the bail or, if the bail consists of a surety bond, to the surety or its designated agent within five (5) days of the order of forfeiture, the court *shall* then discharge the bail, exonerate sureties, and release any cash bonds or property deposited with the court. If the defendant appears or is brought before the court within one hundred eighty (180) days after the order forfeiting bail, the court *shall* rescind the order of forfeiture and *shall* exonerate the bond.

(Emphasis added).

The language of I.C.R. 46(g) and I.C. § 19-2927 establish that a court is required to exonerate a bond if one of the conditions for exoneration in the rule or statute is evidenced to the court. *State v. Abracadabra Bail Bonds*, 131 Idaho 113, 118, 952 P.2d 1249, 1254 (Ct. App. 1998) (where the court was required to exonerate the bond if the clerk of the court had not mailed the bail bondsman notice within five days of forfeiture). Therefore, the court must either grant the motion to exonerate if one of the conditions under I.C.R. 46(g) are met or deny the motion if they are not. Thus, exoneration pursuant to I.C.R. 46(g) is not a discretionary decision of the court.

Another avenue for exonerating a bond is through a motion to set aside the forfeiture of a bond pursuant to I.C.R. 46(e)(4), which provides:

The court which has forfeited bail before remittance of the forfeiture may direct that the forfeiture be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. If the court sets aside the forfeiture, it may, with the written consent of the person posting the bail, reinstate the bail, *or the court may exonerate the bail*, or the court may recommit the defendant to the custody of the sheriff and set new bail or may release the defendant on his or her own recognizance. The court shall give written notice to the person posting the bail or, if the bail consists of a surety bond, to the surety or its designated agent of the action taken by the court. Provided that within seven (7) days of the entry of forfeiture, the court may, for good cause, set aside the forfeiture and reinstate the bail without the consent of the person posting the bail and quash the bench warrant, if still outstanding. At the time of such reinstatement, the court shall provide written notice to the person posting the bail, or, if the bail consists of a surety bond, to the surety or its designated agent.

(Emphasis added).

Forfeiting a bond or refusing to set aside the forfeiture is a final, appealable order or judgment of the court. *State v. Rupp*, 123 Idaho 1, 2, 843 P.2d 151, 152 (1992). Unlike an order granting or denying exoneration pursuant to I.C.R. 46(g), setting aside forfeiture under I.C.R. 46(e)(4) is a discretionary decision to be made by the court. *State v. Fry*, 128 Idaho 50, 53-54, 910 P.2d 164, 167-68 (Ct. App. 1994). In *Fry*, this Court identified several factors to be considered in whether to set aside forfeiture, including: (1) the willfulness of defendant's violation of bail conditions; (2) the surety's participation in locating and apprehending the defendant; (3) the costs, inconvenience, and prejudice suffered by the state as a result of the violation; (4) any intangible costs; (5) the public's interest in ensuring a defendant's appearance; and (6) any mitigating factors. *Id.* at 54, 910 P.2d at 168. These factors are not all-inclusive and the trial court may give weight to other relevant factors, including whether the state exhibited any actual interest in regaining custody of the defendant through prompt efforts to extradite and whether the bonding company has attempted to assist or persuade the defendant to return to Idaho. *State v. Quick Release Bail Bonds*, 144 Idaho 651, 655, 167 P.3d 788, 792 (Ct. App. 2007). After a court grants a motion to set aside the forfeiture, one of several options it may choose is to exonerate the bond. I.C.R. 46(e)(4).

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

In this case, the district court recognized in its order denying Two Jinn's motion to set aside forfeiture and exonerate bond that this was a discretionary issue. The district court then listed the factors for its consideration discussed in *Fry* and *Quick Release* and held:

However, the court cannot conclude, on the facts of this case, that justice does not require enforcement of the forfeiture. First, all evidence indicates that [Lopez's] failure to appear, his flight to Mexico, and his remaining in Mexico is willful and motivated by his desire to avoid prosecution in this state. Second, the state has indicated its continuing interest in regaining custody of [Lopez] and prosecuting him in this state. In fact . . . the state represented that [the United States-Mexico extradition treaty] permits Mexico to treat an extradition request as a request for prosecution in Mexico, and that such a prosecution would prejudice any prosecution of [Lopez] in Idaho pursuant to Idaho Code Section 19-315. Two

Jinn has not adduced any legal authority disputing this conclusion. Accordingly, the court cannot conclude that the state's determination not to seek extradition of [Lopez] at the present time is unreasonable or reflects a lack of interest in regaining custody of [Lopez].

As noted previously, the primary purpose of bail is to ensure a defendant's presence in court. Here, the court determined that the \$50,000.00 bail amount was sufficient to ensure [Lopez's] presence in court. Two Jinn apparently determined that the premium it charged [Lopez] for the bond it posted on his behalf was either sufficient to ensure his presence in court or sufficient to cover its costs in apprehending [Lopez]. The fact that [Lopez] chose to leave the jurisdiction and that Two Jinn is unable to secure his presence is not, alone, sufficient to require the court to set aside the forfeiture and exonerate the bond. This is a risk that Two Jinn assumed in executing the bond on [Lopez's] behalf. Two Jinn was in at least as good a position as the court to determine the risk of flight presented by [Lopez]. While the court believes that Two Jinn likely used its best efforts to locate [Lopez] and attempt to secure his return from Mexico, the court also has no reason to dispute the state's representations regarding the risk associated with making an extradition request to Mexico. Accordingly, the court cannot find that the state acted unreasonably or exhibited a lack of interest in securing [Lopez's] return to Idaho for prosecution by declining to seek [Lopez's] extradition at the present time.

Based on the foregoing language from the district court's order, we conclude that the district court recognized its discretion and acted reasonably within the boundaries of its discretion by identifying and applying the factors from *Fry* and *Quick Release* that it deemed most relevant to its determination.

The district court considered the willfulness of Lopez's flight as well as the efforts that had been expended in procuring his presence. Notably, the district court also held that the state acted reasonably based on the risk associated with seeking extradition from Mexico. At oral argument, Two Jinn did not dispute but, rather, conceded the state's interpretation of the extradition treaty between the United States and Mexico that an extradition request could be treated like a request to prosecute in Mexico which would bar further prosecution in Idaho. The state is not free to arbitrarily and unreasonably refuse to extradite and then receive the financial benefit of a forfeited bond. In cases where the district court finds that the state has acted unreasonably, the district court has discretion to set aside forfeiture and order a complete or partial exoneration of the bond. However, in this case, the district court held that the state had not acted unreasonably, and Two Jinn conceded that the state's interpretation of the extradition treaty was legitimate. On appeal, Two Jinn makes no contrary argument regarding the treaty's

provisions. Therefore, we are constrained to hold that the district court did not abuse its discretion in denying Two Jinn's motion to set aside forfeiture and exonerate bond.<sup>3</sup>

Two Jinn argues that the district court's determination was unreasonable because, it contends, the district court was under the mistaken belief that Two Jinn could charge whatever premium it desired based on Lopez's flight risk. We are not persuaded by this interpretation of the district court's language. The district court did not state that Two Jinn was free to charge whatever premium it desired. Rather, the district court stated that Two Jinn made a business decision that the premium it received for its service was sufficient to cover its risk or it would not have assumed Lopez as a client.<sup>4</sup> Sometimes this requires that Two Jinn be required to pay when the situation does not unfold as planned. Two Jinn argues that enforcing forfeiture and refusing to exonerate bond when the state declined to extradite is punitive. We disagree that this makes the district court's determination punitive. Just because Two Jinn now finds itself with a client who has fled to Mexico and a state which reasonably declines to seek extradition does not automatically entitle Two Jinn to a set aside of forfeiture and an exoneration of bond. Therefore, the district court's reasoning does not evidence an abuse of discretion.

Two Jinn next contends that, because the state has not provided specific information regarding its costs, inconvenience and prejudice suffered, it would receive a windfall if the forfeiture was not set aside and exoneration of bond ordered in this case. In *Quick Release*, this Court observed that the state is not entitled to a windfall where the amount of bail far exceeds the state's costs. *Quick Release*, 144 Idaho at 655, 167 P.3d at 792. However, *Quick Release* can be distinguished from the present case in this regard. In *Quick Release*, the defendant was returned to Idaho and convicted of the charged offense. In seeking to enforce forfeiture, the state then asserted that it had suffered cost, inconvenience, and prejudice as a result of the defendant's violation, but provided no documentation of the alleged cost and inconvenience. In this case, Lopez remains in Mexico and the state cannot protect its interests through his prosecution. This

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<sup>3</sup> We have not been asked to address, and we imply no opinion about, the accuracy of the state's interpretation of the extradition treaty.

<sup>4</sup> Two Jinn contends that if it did not assume the risk of Lopez failing to appear it would effectively preclude his release on bail and thus, deprive him of his constitutional right to bail. We are not persuaded that Two Jinn is required to assume as clients all defendants who come through its doors or they will be denied their constitutional right to bail. Therefore, we do not further address Two Jinn's theoretical constitutional concerns.

is not a situation similar to that in *Quick Release* where the state sought to be made whole after defendant had been returned to custody and convicted. We emphasize that, as a discretionary matter, a district court has authority to order partial forfeiture in an amount substantially less than the posted bond amount. However, the court here was not required to do so.

Two Jinn further argues that it believes that the state's refusal to seek extradition is unsubstantiated and unreasonable. Two Jinn also contends it has fulfilled its contractual obligations to the fullest extent that is legally possible and has incurred significant costs in tracking Lopez down in Mexico and attempting to convince him to return to the United States. These factors were considered by the district court in its order denying Two Jinn's motion to set aside forfeiture and exonerate bond. We do not exercise free review over the district court's determination. The correct standard of review is for an abuse of discretion. Two Jinn argues that this Court exercises free review over the district court's determination because the district court was interpreting I.C.R. 46(e)(4). This argument is incorrect. The district court was not interpreting Rule 46. Rather, it was following the statute and exercising the discretion vested to it therein. This Court will not revisit the factors and considerations that were properly weighed by the district court.

Two Jinn additionally argues that the district court abused its discretion because it over-emphasized two of the factors in its consideration--the willfulness of Lopez's flight and the state's interest in maintaining its right to prosecute Lopez in Idaho. Two Jinn contends that the district court failed to consider other factors such as Two Jinn's participation in locating and apprehending Lopez and other mitigating factors. However, it is clear from the language quoted above that the district court did consider Two Jinn's efforts in locating and apprehending Lopez. The district court had discretion to give added weight to factors that it considered to be of greater importance. The district court exercised this discretion by emphasizing several factors in its decision which it found most important to the resolution of the issue. Therefore, the district court did not abuse its discretion in this regard.

### **III.**

### **CONCLUSION**

The district court properly considered the factors relevant to its determination whether to set aside forfeiture and exonerate bond and was not required to give all the factors equal weight. The district court did not misstate Two Jinn's assumption of risk in assuming Lopez as a client.



The district court's determination was not punitive and it was within its discretion to order a total forfeiture of the bond. Therefore, the district court did not abuse its discretion, and its order denying Two Jinn's motion to set aside forfeiture and exonerate bond is affirmed.

Chief Judge LANSING and Judge GRATTON, **CONCUR.**